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SEISIN AND DISSEISIN (*Concluded*)

V

CHATTELS

IT would have been strange if the importance of seisin in the transfer and devolution of land had not been reflected in the law of chattels. Pollock and Maitland think it fairly certain that in the time of Bracton the ownership of a chattel could not be transferred from one person to another, either by way of gift or by way of sale, without a manual delivery.[338] No such elaborate titles had to be proved as in the case of land, but it was a common form to allege that one had been possessed of the chattels as of his own goods and had then bailed or lost them.[339] "An executor counting on his title regularly stated that the testator died seised." [340] Again, marriage was an absolute gift to the husband of all chattels personal in possession which the wife held in her own right.[341]

On the other hand, the elaborate system of assizes and writs of entry by which the royal courts had wrested jurisdiction from the courts of the lords [342] was based on seisin of freehold alone, and seisin of freehold was applicable only to land as was the whole law of estates. And while land could not be transferred by will, there was no such restriction in the case of chattels. In truth the acquisitiveness of the king's courts and the exigencies of the feudal tenure gave seisin of freehold a unique position in the law of land entirely beyond anything attained by seisin in the law of chattels. Otherwise it would not have taken a great historian like Mait-

[338] 2 POLLOCK AND MAITLAND, 180.

[339] The classic count in trover is the most familiar instance of this and seems to have been based on a similar count in *detinue sur trover*. See COKE'S ENTRIES, 169b, and Ames, 3 SELECT ESSAYS, 417, 440. Such an allegation was not frequent in detinue on a bailment (see Whitehead *v.* Harrison, 6 Q. B. 423 (1844)), but in Y. B. 6 HEN. VII, 7–4, in an action of trespass, the defendant pleaded that one J. S. had been possessed of the chattels as of his own goods and had bailed them to the plaintiff.

[340] Ames, 3 SELECT ESSAYS, 541, 557, and see Maitland, 1 L. QUART. REV. 329.

[341] CO. LIT. 351b.

[342] 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 146, 172; 2 *Id.*, 65, 77; Maitland, 4 L. QUART. REV. 27.

land to discover that there had been such a thing as seisin of chattels.

One element, and an important one, the law of chattels owed to these new remedies as to land, and that was the notion of an action of damages which seems to have originated with the assize of novel disseisin.[343] Otherwise their influence on detinue, trespass, and replevin, the three actions as to chattels, seems to have been slight. Detinue was of the type of the old proprietary writ of right;[344] the writ of trespass said nothing as to seisin or possession, and trespass de bonis was associated with the appeal of robbery rather than with the assize,[345] while the rule in replevin that the plaintiff did not have to reply to the avowry if the defendant were *still seised* of the chattels seems to have antedated the assize.[346] It was because of the shortcomings of the assize that trespass gradually developed into a distinctly possessory action itself,[347] until finally, as we have seen,[348] trespass-possession supplanted assize-possession altogether.[349]

There could of course be no 'tortious freehold' in the case of chattels, but right could be separated from the property just as right could be separated from the land, and to a slight extent this notion prevailed. As in the case of land such separation did not follow from a lease, so in the case of chattels it did not result from a bailment,[350] nor where goods were taken by way of distress.[351] The two examples of it that we have are cases of theft and trespass.[352] The difficulty in its application to chattels was that there was no such convenient term as freehold to indicate the possession of the wrongdoer. When property was used in this sense it was used to indicate the tangible thing and the rights arising from the hostile possession thereof in contrast with the right of property from which the property itself had become separated. But this use of 'prop-

[343] 2 POLLOCK AND MAITLAND, 522–525.

[344] 2 POLLOCK AND MAITLAND, 173, 177, 206.

[345] See 29 HARV. L. REV., 388, 392, 507.

[346] Maitland, 1 L. QUART. REV., 327; 2 POLLOCK AND MAITLAND, 47; 29 HARV. L. REV 391.

[347] 34 HARV. L. REV. 595.

[348] 34 HARV. L. REV. 600.

[349] The phrases are Maitland's. See 3 SELECT ESSAYS, 591, 606.

[350] 2 POLLOCK AND MAITLAND, 176; 29 HARV. L. REV. 501.

[351] 29 HARV. L. REV. 393.

[352] Ames, 3 SELECT ESSAYS, 541, 542.

erty' to indicate posssessory right as distinct from proprietary right seems never to have become quite natural.[353] When the defendant in a replevin proceeding claimed the 'property' in the goods he was making a claim of right of property or ownership, and that this was the generally accepted meaning of property, even in the time of Edward III, is evident from the anxiety the lawyers showed that the juries would not understand that the tortfeasor had 'property' at all.[354] Such use was technical and no doubt influenced by the rigid prohibition of self-help in the time of Edward I which extended to chattels as well as to land.[355]

That the use of 'property' as analogous to 'tortious freehold' ever had much positive influence in the law is doubtful.[356] It may have had some influence in restricting the use of trespass and replevin against one who held subsequent to the first converter,[357] but if so it only cleared the way for conversion in such cases. It was not long applied to theft, for the appeal of larceny lay against the second thief,[358] and except for Brian, C. J., the judges of the 1400's saw in it nothing more than that trespass was an action for damages and that by the proceedings in trespass the property in the chattel might be lost.[359]

In the 1400's, chattels came to be transferable by deed without delivery,[360] and also it would appear by sale.[361] Sixty years and more, therefore, before the Statute of Uses destroyed the dominance of the feoffment in the transfer of land, the necessity for a delivery in the transfer of a chattel had been obviated without statutory

[353] T. Cyprian Williams (11 L. QUART. REV. 224–226) argues that "property, in the strict sense of the word, cannot exist apart from the possession of corporeal things." But he admits that 'property' was used more extensively to include the right of one "from whom goods had been wrongfully taken" as early as the 1400's. See also his note (5), p. 234.

[354] 29 HARV. L. REV. 374, 375. [355] *Id.*, 374.

[356] That it had a very pernicious influence in entailing upon us a confused vocabulary, see 2 POLLOCK AND MAITLAND, 168.

[357] But see 29 HARV. L. REV. 382.

[358] *Id.*, 380. [359] *Id.*, 385.

[360] Y. B. 7 ED. IV. 20–21; 2 POLLOCK AND MAITLAND, 181; Cochrane *v.* Moore, L. R. 25 Q. B. D. 57, 67 (1890).

[361] BLACKBURN, SALE, 283 *et seq.*; Y. B. 17 ED. IV, 1–2. Sergeant Manning's assertion that the transfer of title by sale without delivery is a comparatively modern rule (2 Man. & Ry. 567) would seem to have been successfully refuted by Lord Blackburn. But see Maitland, 3 SELECT ESSAYS, 595, 610 n., and Cochrane *v.* Moore, *supra*, p. 71.

aid. The diversity between land and chattels as to the need of an entry to base an action or effect a transfer soon appeared in the cases.[362]

That the one who had bailed his own goods could transfer them to a stranger seems to have been accepted as a matter of course during the 1400's.[363] The doubt lay as to whether he could make an oral gift of them to the trespasser after the latter had taken them from the bailee. Littleton, as counsel, made the point that in such a case the gift was void,[364] and Brian, as chief justice, later argued to the same effect.[365] The numerical weight of judicial authority at least was that such a right was transferable.[366] All seemed to agree to the notion so prevalent in the later law that 'property' was something inherently transferable, but Brian stubbornly adhered to the distinction between property and right of property and argued that they were not the same thing. Occasional statements are to be found since Brian of the non-transferability of a chattel taken by a trespasser,[367] but they are in the main

[362] Y. B. 14 HEN. VIII, 23b; BRO. ABR., *Chose in Action*, pl. 14; 29 HARV. L. REV. 515.

[363] See Y. B. 11 HEN. IV, 23–46; Y. B. 2 ED. IV, 16–18; Y. B. 6 HEN. VII 7,–4. Mr. Cyprian Williams (11 L. QUART. REV. 223, 227, n. 5) suggests that the right to transfer did not exist where the bailment deprived the bailor of the right to immediate possession, but in the first of the above cases the bailment was for a year. Hankford, C. J., was very emphatic that even in such a case it was the bailor who had the property and not the bailee.

[364] Y. B. 2 ED. IV, 16–8.

[365] Y. B. 6 HEN. VII, 7–4; Y. B. 10 HEN. VII, 27–13. In each of these cases, Keble, as counsel, argued that the gift to the trespasser would be good,—first, because a gift to a stranger would be good; second, as a release by parole. In the first case Vavisor, J., agreed as to the first point but denied that a release might be by parole even in the case of chattels. Brian, C. J., denied both propositions, but to support his case had to make the following inadmissible contentions: First, that although the bailment or trover in detinue was no longer traversable, detinue was not available where there had been a trespass; second, that in replevin, property in the plaintiff at the time of action brought was not sufficient and that he must have had property at the time of the taking; third, that if goods had been taken from one, the goods would not be forfeited on his attainder; fourth, that there would be no escheat if the disseisee died without heir; fifth, that if the lord had no writ of escheat, he could have no entry. As to the exact point in both cases, that of a gift or sale to the trespasser, the law was definitely settled contrary to Brian's opinion. See PERKINS, PROFITABLE BOOK, § 92; SHEPPARD, LAW OF COMMON ASSURANCES, 12. As to the gift or sale to a stranger, Brian did not speak with his wanted assurance. In the second case, he said: "It seems to me that the gift made to a stranger is void."

[366] Danby, C. J., Needham, J., and Vavisor, J., as against Brian, C. J.

[367] Dictum by Manwood, C. B., in Russel *v.* Prat, 4 Leon. 44, 46. SHEPPARD, TOUCH-

reflections of the rule that had become crystallized under the Pretended Title Act that rights of entry were not alienable. The one from whom chattels had been taken had 'property,'[368] and property was inherently transferable, but their transfer might yet be invalid because of maintenance.

Not much of a case could have been made for the subsequent importance of Brian's 'right of property' in the law had it not been for the assumption running all through The Disseisin of Chattels that his 'right of property' and the chose in action of the later law[369] were the same thing, or rather that 'right of property' as used by Brian was one kind of chose in action. Ames would also have included the right of the reversioner, of the remainderman, and of the bailor in the list.[370] On the other hand, in Warren's long list of those things which on good authority have been deemed to be choses in action,[371] he mentions none of these.[372] And of the use of the term 'chose in action' to indicate either the right to a chattel in the hostile possession of another or the chattel itself there is very little, if any, evidence in any of the English authorities. Warren mentions the right of action for trespass for goods taken away as a chose in action,[373] and there are many instances of this,[374] but to identify the right to an action for goods taken away with Brian's 'right of property' would seem to be a pure assumption. It ignores the right of reception and is directly opposed to Littleton.[375]

STONE, 6 ed., 240, 241; Ames, 3 SELECT ESSAYS, 541, 556. See also JACOB, LAW DICT., tit. Chose.

[368] The law is so stated in the passage which Ames quotes from SHEPPARD'S TOUCHSTONE, but the statement is explained away by Preston, from whom Ames derived his doctrine of disseisin.

[369] Two instances of the use of the term chose in action are to be found in the Year Books, 9 HEN. VI, 64–17, and 37 HEN. VI, 13–3, cited by Sweet, 10 L. QUART. REV. 304, but it owed its currency in the later law to its use by BROOKE in his ABRIDGMENT as a part of the title-head '*Chose en Action & Chose en Suspence.*' See Sweet, *id.*

[370] 3 SELECT ESSAYS, 541, 581. [371] WARREN, CHOSES IN ACTION, 19–26.

[372] On page 25 he mentions "the reversionary interest under a will or settlement" but his citations show that he is not referring to the common-law reversion.

[373] *Ibid.*, 20.

[374] See the definitions of chose in action in TERMES DE LA LEY and in BLOUNT'S, COWELL'S and JACOB'S LAW DICTIONARIES.

[375] Section 497. Ames complains that here Littleton's view savors of scholasticism (3 SELECT ESSAYS, 572), but to the writer this criticism would appear to apply rather to Ames' own view.

Chose in action was broader than right of action, for it included things lying only in action, such as a debt not yet due and a right to land after the right of entry was gone.[376] Sometimes, it is true, chose in action was used to indicate any unassignable right[377] and in this sense the right of entry was sometimes referred to as a chose in action,[378] but in such a case the right was not unassignable because it was a chose in action but was a chose in action because it was unassignable. Its unassignability might be due to the privity or personal relationship between the parties to the obligation, as in the case of the chose in action proper,[379] or have been influenced by the Pretended Title Act, as in the case of the right of entry,[380] and in either case bear witness of a time when things were transferable and rights were not.[381] But the use of chose in action in this broad sense of the word neither went very deep nor lasted very long.[382] The chose in action [383] and the right of entry [384] both date from the late Middle Ages, and except for the fact that they were both unassignable their histories were quite distinct.[385]

Blackstone's Commentaries gave currency to another use of the term 'chose in action,'—to indicate one class of personal property.[386] In contrast with the chose in action was the chose in possession.[387] This classification has been judicially determined to be exhaustive.[388] Here 'property' has gone far beyond the meaning given it by Brian's opponents so as to include a vast number of

[376] T. Cyprian Williams, 10 L. QUART. REV. 143, 11 L. QUART. REV. 223, 228–230, especially note 2, page 230; Charles Sweet, 10 L. QUART. REV. 303, 304.

[377] Sweet, 10 L. QUART. REV. 303, 307.

[378] Williams, 11 L. QUART. REV. 223, 232, note 2.

[379] POLLOCK, CONTRACTS (Wald and Williston's ed.), Appendix, Note F.

[380] 34 HARV. L. REV 615.

[381] *Infra*, p. 724.

[382] This is shown by the fact that the chose in action survived its non-assignability. The application of the term to rights in land ceased to have vogue in the 1700's. See Sweet, 10 L. QUART. REV. 303, 308.

[383] *Supra*, n. 369.

[384] *Supra.*

[385] The difference in their histories is brought out by Sweet in his contrast between choses in action real and choses in action personal. 10 L. QUART. REV. 303, 308–311.

[386] Bk. II, pp. 389, 396.

[387] Blackstone himself does not seem to use the term 'chose in possession,' but it has been used extensively since his time in contrast with 'chose in action.'

[388] See the opinion of Fry, L. J., in the Court of Appeals in Colonial Bank *v.* Whinney, L. R. 30 Ch. D. 261, 285 (1885), approved in the House of Lords, L. R. 11 A. C. 426 (1886).

contractual and even non-contractual rights which they would never have thought of as 'property.'[389] Neither 'chose in action' nor 'chose in possession' is a fitting term to designate many of the rights which have to be included under them, if this classification is to be considered exhaustive. Thus it is hard to include a right to a chattel in the adverse possession of another as a chose in possession,[390] just as it is hard to include under choses in action such incorporeal rights as patents, copyrights, and trade names which have none of the ephemeral characteristics of rights of action.[391] Yet it would seem that when replevin came to be concurrent with trespass, it would still have been allowed to the husband in his own name to recover a chattel belonging to his wife which had been taken from her before marriage despite the fact that replevin now lay where the taking had been by way of trespass,[392] and if so the chattel must have been considered one of the wife's choses in possession,[393] for the test in such a case was the ability of the husband to bring the action in his own name.[394] And the decided weight of authority and reason would seem to be that if this classification is exhaustive, patents, copyrights, and trade names must be considered as choses in action.[395] With the passing of the right of the husband to the wife's chattels, chose in possession has fallen into the background, but chose in action would seem to be too deeply rooted for there to be much chance of its early extinction. Its broad use to indicate incorporeal personal property in general rather than the right to recover something has this support in the

[389] This is brought out by Lindley, L. J., in his opinion in the Court of Appeals in Colonial Bank *v.* Whinney. See also Williams, 11 L. QUART. REV. 223, 227.

[390] See Brodhurst, 11 L. QUART. REV. 68.

[391] *Id.*, 75. See also on the same page the editorial note of Sir Frederick Pollock.

[392] FITZ., NAT. BREV. 69 K; Powes & Uxor *v.* Marshall, 1 Sid. 172, 1 Keb. 641; Bearn & Ux. *v.* Mattaire, Cas. T. Hard. 111 (1735); COM. DIG. "Pleader," 3 K; BULLER, NISI PRIUS, 53; BAC. ABR. "Baron & Feme," (K).

[393] See Williams, 10 L. QUART. REV. 143, 153, 11 L. QUART. REV. 223, 234, n. 5.

[394] See Co. LIT. 351b and 16 HALSBURY, LAWS OF ENGLAND, 329. Ames recognizes the right of the husband to bring an action in his own name as the test of a chose in possession (3 SELECT ESSAYS, 541, 559), but in this connection does not refer to the change wrought by the concurrence of replevin and trespass.

[395] Elphinstone, who raised the question, regarded the matter as doubtful. (9 L. QUART. REV. 311, 315). Williams (11 L. QUART. REV. 223, 237) and Sweet (*Id.*, 283) regarded a copyright as a chose in action, while Brodhurst and Pollock (11 L. QUART. REV. 75) were inclined to consider it a chose in possession.

old 'right of property' that it too was broader than a right to recover something, for it might coexist with the seisin itself.[396]

Maitland did not identify the chose in action with the right of the disseised owner,[397] but he believed that the inalienability of both went back to a time when things could be transferred but mere rights could not be.[398] Such would appear to have been the necessary meaning of the old rules as to the importance of seisin in the transmission of property as long as seisin remained a reality. Possession or the thing itself could be transferred, the right apart from the possession could not be. But so far did the Middle Ages carry the conception of a thing and of a thing of which one could be seised that to the layman rights must have seemed as transferable as the land. Incorporeal things, in which the Middle Ages were rich, reversions, and remainders, could be transferred,[399] and even the lawyers seem to have been clear that this was in reality the transfer of a right and not of a thing. At least this must have been so as far back as the recognition of the innocent operation of the grant as compared with the tortious operation of the feoffment, and this goes back at least as far as the reign of Edward II.[400] To the writer the necessity of the attornment to complete a grant would seem not so much an indication that the transfer was regarded as the transfer of a thing as that in the Middle Ages great stress was laid on the formal receipt by the transferee, whether of the land itself or of some right therein. The attornment corresponded to the entry in the case of an exchange or of a livery within the view.[401] In the case of the freehold, as in that of the lease, entry was the *sine qua non* of a transfer.[402] From this it followed that if one's entry was lost, no transfer was possible. But however it may have been at law, in equity the transfer of a right without the transfer of a thing seems to have been taken for granted from the first.[403]

Enlightening as Maitland's theory is, while it may not "take us

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[396] 34 HARV. L. REV. 605.

[397] 3 SELECT ESSAYS, 591, 609.

[398] *Id.*, 602.

[399] 34 HARV. L. REV. 593.

[400] Maitlands Note (1) to Sel. Soc. Y. B. 3 ED. II. p. 7. See also 34 HARV. L. REV. 593.

[401] 34 HARV. L. REV. 594.

[402] 2 POLLOCK AND MAITLAND 2 [illegible].

[403] WARREN, CHOSES IN ACTION, 52.

back to a merely hypothetical age of darkness," [404] it would seem to take us back to a time antedating the grant [405] and therefore beyond the confines of the traditional common law.[406] However this may be, to Maitland it seemed that a very large part of the history of Real Property Law is the history of the process whereby Englishmen thought themselves free of that materialism which would have made a change of possession an essential of transfer.[407] To Ames this materialism was a necessary principle for all time.[408] Maitland spoke as a legal historian, Ames as an historical jurist.

VI

In the United States

The rout of seisin had already occurred at the time of the first settlement of the English colonies in America. The real actions had given way to ejectment as the common method of trying titles to land in the reign of Elizabeth [409] and the transfer of the freehold by lease and release without entry was formally recognized the year the Pilgrims landed on Plymouth Rock.[410] The fictions of ejectment did not appeal to the Puritan sense of righteousness and so an action on the case was used extensively for the recovery of land.[411] Later, writs of entry were used in Massachusetts [412] and New Hampshire,[413] and a writ of disseisin in Connecticut.[414] In Massachusetts, after it had become a state, the attempt was even made to revive all the intricacies of the old English writs of entry,[415] but this was unsuccessful and a single statutory writ was established in their stead.[416] In Connecticut the writ of disseisin took

[404] 3 Select Essays, 591, 602.

[405] That the requirement of a deed for the creation and transfer of non-tenurial rents was probably aboriginal, see 2 Pollock and Maitland, 132.

[406] "A tradition, which is in the main a sound and truthful tradition, has been maintained about so much of English legal history as lies on this side of the reign of Edward I." 1 Pollock and Maitland, xxxiv.

[407] 3 Select Essays, 591, 602.

[408] 3 Select Essays, 541, 564, 582, 590.

[409] 34 Harv. L. Rev. 600.

[410] 34 Harv. L. Rev. 599, n. 90.

[411] Stearns, Real Actions, p. 396, n., p. 491, n. A.

[412] Sedgwick and Wait, 3 Select Essays, 611, 638.

[413] *Id.*, 642. [414] *Id.*, 643.

[415] See the remarks of Judge Jackson in 2 American Jurist, 65.

[416] Sedgwick and Wait, 3 Select Essays, 611, 642.

the place of writs of right, writs of entry and ejectment alike.[417] These served to keep alive the terminology of seisin and disseisin in the New England states, but there was no such graduated series of actions as marked the medieval land law and the net result was more like ejectment stripped of its fictions than it was like the medieval system.[418] Outside New England, the old real actions seem to have been even less in evidence, either in substance or form, than in England during the same period.[419]

In the forms of conveyance, the revolution was even more thoroughgoing than it had been in England. There the feoffment, fine, and recovery continued to be used for their peculiar effects after the lease and release had superseded them in common practice.[420] In the United States livery of seisin seems to have been almost unknown,[421] the common recovery was rarely resorted to except to dock an entail,[422] and the fine seems to have been used only in New York, where it was occasionally resorted to to clear up titles. Both

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[417] Sedgwick and Wait, 3 SELECT ESSAYS, 643.

[418] For instance, instead of allowing the recovery of land with damages in a writ of entry, it was necessary to bring a subsequent action for mesne profits, as in ejectment. See STEARNS, REAL ACTIONS, 396 n.

[419] The contrast between the Massachusetts practice and that in New York and other states is noticed by STEARNS, REAL ACTIONS, 62.

[420] 34 HARV. L. REV. 602.

[421] For a case where the old ceremony of livery was carried out with great formality, see McGregor *v.* Comstock, 17 N. Y. 162 (1858), where this was done as a preliminary to levying a fine. The case seems to be unique. In 1844 (Bryan *v.* Bradley, 16 Conn. 474) a Connecticut judge said that there were early instances of livery of seisin as appeared by endorsements on deeds but none of recent date. In 1823 (Lyle *v.* Richards, 9 Serg. & R. (Pa.) 322) Tilghman, C. J., said that he had never heard of one in Pennsylvania. In 1837 (Dehon *v.* Redfern, Rice, L. 464) there was a tender of livery and the court held that the livery would have destroyed a contingent remainder, but the court admitted that no previous case of livery had arisen in South Carolina for a long time. It had been argued that the practice was obsolete from long disuse. In 1883, 18 SOUTH CAROLINA L., 430, the South Carolina legislature enacted that feoffment with livery of seisin should not defeat a remainder. This was apparently the result of two cases decided in 1877, — Faber *v.* Police, 10 S. C. 376 (1877), and McElwee *v.* Wheeler, 10 S. C. 392 (1878), which upheld the tortious feoffment.

[422] Common recoveries seem to have been in vogue at one time in New Jersey for barring contingent estates. (Den *v.* Crawford, 3 Halst. L. 90, 109 (1825)). They were abolished in 1799. In Lyle *v.* Richards, *supra*, the Supreme Court of Pennsylvania, over the vigorous dissent of Gibson, J., allowed the barring of a contingent remainder by a common recovery. This case was followed in Abbott *v.* Jenkins, 10 Serg. & R. (Pa.) 296 (1823); Stump *v.* Findlay, 2 Rawle (Pa.) 168 (1828), Waddell *v.* Rattew, 5 Rawle (Pa.), 231 (1835). *Quaere* whether they would be followed to-day.

fines and recoveries were abolished there in 1829.[423] Under statutes dispensing with livery of seisin a deed was often,[424] and sometimes still is,[425] considered to have the effect of a feoffment, but this was for the purpose of supporting the conveyance and not to effect the peculiar results produced by a conveyance operating by transmutation of possession.[426] In most of the colonies a statutory deed was the accepted form of conveyance from the first.[427] At the present time the Statute of Uses is sometimes resorted to to support some instrument as a bargain and sale or a covenant to stand seised, but this is usually because the instrument fails to meet the requirements of the statutory deed and not because the statutory deed would not have been equally efficacious.[428]

In Maryland, Massachusetts, New Hampshire, New Jersey and Pennsylvania, the cases show that common recoveries were once used to bar entails (see 26 Am. Dec. 725), but it was held (Jewell *v.* Warner, 35 N. H. 176 (1857)) that estates tail had been abolished by implication in New Hampshire in 1789 and both fines and recoveries were expressly abolished in New Jersey in 1799. It was enacted that estates tail might be docked by simple deed in Maryland, in 1782, in Massachusetts in 1792, and in Pennsylvania in 1799. Pennsylvania seems to be the only state where common recoveries ever found any favor. Fines and recoveries to bar entails are still given statutory recognition there (2 PURDON'S DIGEST, 13 ed., 1483), and in Delaware (REV. CD. DEL. 1915, p. 1494).

[423] 4 KENT. COM. 497. "Fines, as a mode of conveyance, do not appear ever to have been adopted in the country; and common recoveries, though resorted to for other purposes, are not known to have been used for the transfer of the estates of femes covert." Story, J., in Durant *v.* Ritchie, 4 Mass. (U. S.) 45, 55, Fed. Cas. 4190 (1825).

[424] Emery *v.* Chase, 5 Me. 232 (1828); Cheney's Lessee *v.* Watkins, 1 Har. & J. (Md.) 527 (1804); Thatcher *v.* Omans, 3 Pick. (Mass.) 522; Perry *v.* Price, 1 Mo. 553 (1825).

[425] Rogers *v.* Sisters of Charity, 55 Atl. 318, 97 Md. 550 (1903); Carr *v.* Richardson, 157 Mass. 576, 32 N. E. 958 (1893); Johnston *v.* Kramer Bros. & Co., 203 Fed. 733 (1913).

[426] Dennett *v.* Dennett, 40 N. H. 498, 505 (1860).

[427] The case of Massachusetts may be taken as fairly typical. 4 DANE, ABRIDGMENT, 85, says: "This whole system of conveyance by deed recorded, that so well enables every man usually to know every man's title, has grown out of a few statutes, predicated on a few sound and plain principles, and passed by the legislature of the colony in its early settlement. In this system, a deed duly signed, sealed, delivered, and acknowledged, is made the ground work in every conveyance of any importance; and in the first settlement of the country this deed, [was] accompanied either by livery and seizin on the land conveyed, or by a public record of the deed in the county in which the land conveyed is situated. But after the use of such deed recorded, was well ascertained and understood, this livery of seizin was discontinued, and this deed recorded, properly viewed as the best evidence of conveyance and the best sort of notoriety. This public record of deeds naturally led to other records equally useful, as the records of devises and of executions levied on lands."

[428] 3 WASHBURN, REAL PROPERTY, 6 ed., 347.

The universal form of tenure in the colonies was free and common socage. Thus the colonists escaped from the burdensome incidents of military tenure which were not formally abolished in England until after the restoration of Charles the Second.[429] In some states all tenures in fee simple were abolished by statute, while in others this was considered to have resulted from the change from a monarchical to a republican form of government.[430] Certainly the feudal relationship was a personal one and there would be little left of the theory of feudal tenure in England today with the king left out. It might be tenure but it would hardly be feudal. Gray argues that in theory a tenant in fee simple holds of the state,[431] but he gives no judicial determination of a state court in support of his contention of as recent a date as the case of *Matthews* v. *Ward*,[432] in 1839, which held to the contrary. The only state case he gives in his support[433] was subsequently overruled.[434] If it were desirable to revive tenure one might be inclined to give more weight to his argument,[435] but as tenure was perhaps the most striking instance of the artificial differentiation between the law of chattels and the law of land, its revival would seem distinctly undesirable.

In avoiding the artificialities of seisin and disseisin and tenure the American colonies had a distinct advantage over their English neighbors of the same period. They were making a fresh start, and under conditions vitally different from those of England. The social order was not favorable to entailed estates or family settlements or primogeniture. It was not favorable to a professional

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[429] 1 STORY, CONST., § 172.

[430] See GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 23.

[431] *Id.*, § 22.

[432] 10 G. & J. (Md.) 443, 451 (1839). Gray also cites United States *v.* Repentigny, 5 Wall. (U. S.) 211, 267 (1866), but there the continuance of tenure is assumed rather than discussed.

[433] Ingersoll *v.* Sergeant, 1 Whart. (Pa.) 337 (1836).

[434] Wallace *v.* Harmstad, 44 Pa. 492 (1863).

[435] Gray cites Sharswood and Hoffman in support of his contention of the survival of tenure in the United States, but their views are obviously so effected by the natural but regrettable tendency of law teachers to stress their learning as living law rather than the history it in fact is, as to be of little weight. See especially SHARSWOOD, LAW LECTURES, 190, and HOFFMAN, LEGAL OUTLINES, 591. Kent, Story, Washburn, and Cooley regarded every real vestige of tenure as wiped out. See 4 KENT. COM. 24, 3 *id.*, 509–514; 1 STORY, CONST., § 172; 1 WASHBURN, REAL PROPERTY, 6 ed., § 118; 2 COOLEY'S BLACKSTONE, 102, n. 22.

class of lawyers. Even though the colonists had attempted to transplant the English law in its entirety, much of it would have gone by the board. But except perhaps in Maryland they made no such attempt. In all the colonies except Maryland there were early codifications of the essential features of the law and in many respects these codes departed radically from the common law.[436] This was especially true of the law of property. Land was to be conveyed by deed [437] and to be subject to execution.[438] In some cases prescription for land was established and a short period of from five to seven years instituted.[439] The American system of recording deeds dates from this early period,[440] as does most of what is characteristic in our modern American property law. The most striking change was in the law of intestate succession as to land. In 1692 Massachusetts passed a law dividing the land among all the children with a double portion for the oldest son, and a similar law was adopted in Connecticut in 1699.[441] But these laws merely embodied the practice which had been in vogue for over sixty years.[442] The Privy Council refused to acknowledge the validity of the Connecticut law in an appeal that managed to reach it,[443] but the law continued in force despite the decision.[444]

In Massachusetts, Connecticut, and New Haven, and to a certain extent in New Jersey, it was declared at an early period that the law of the Scripture, rather than the common law, was subsidiary law,[445] and although, in absence of colonial legislation, the common law was expressly recognized at an early date in Maryland, Virginia, and the Carolinas,[446] no general reception of the common law was possible until the rise of a trained bar in the 1700's.[447] Writing of a period as late as 1799, Kent, J., says:

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[436] Reinsch, 1 SELECT ESSAYS, 367, 410.

[437] See *supra*, p. 727.

[438] Reinsch, 1 SELECT ESSAYS, 367, 412.

[439] *Id.*

[440] See Beale, "Recording Deeds in America," 19 GREEN BAG, 335.

[441] Andrews, 1 SELECT ESSAYS, 431, 437.

[442] *Id.*, 437, 438.

[443] Winthrop *v.* Lechmere, 1 THAYER, CASES CONST. LAW, 34. See Andrew's 1 SELECT ESSAYS, 431, 445 *et seq.*

[444] Andrews, 1 SELECT ESSAYS, 431, 462.

[445] Reinsch, 1 SELECT ESSAYS, 367, 411.

[446] *Id.*, 411.

[447] See *Id.*, 369, 415, and Pound, 27 W. VA. L. QUART. 1, 5.

"We had no law of our own, and nobody knew what it was . . . I made much use of the *Corpus Juris* & as the Judges (Livingston excepted) knew nothing of French or civil law I had immense advantage over them. I could generally put my Brethen to rout & carry my point by mysterious want (*sic*) of French and civil law. . . . English authorities did not stand very high in those feverish times."[448]

These words of Kent give some indication of the break in legal tradition from the settlement of America to the first publication of the reports. There was a reception of the common law, no doubt, but the qualification that only such of the common law was adopted as was suited to the condition of the colonies is sometimes overlooked. Survivals of medieval law, which were not looked on with favor even in England, were likely to fare badly. So it was with such of the old law of seisin and disseisin as still survived in England. Seisin and disseisin had come to be looked on as distinctly feudal[449] and had to bear that opprobrium in a new country after the telling assaults which Lord Mansfield had directed against them.[450] The extent to which five of the old rules were adopted in this country will be briefly examined. They are: (1) seisin a stock of descent, (2) seisin a prerequisite of a devise, (3) of dower, (4) of curtesy, and (5) of a conveyance *inter vivos*.

(1) In only three states—New York, North Carolina, and Maryland—does the rule, *seisina facit stipitem*, seem ever to have had anything like its old English place in the law of the courts. In New York this was changed by the Revised Statutes[451] (1828), and in North Carolina the decision in 1854[452] that the old rule was in force was promptly met by a provision in the Revised Code of 1854[453] substituting right title and interest for seisin as the stock of descent. In Maryland alone did the rule thrive.[454] There it continues to flourish.[455] Outside of Maryland, traces of the old

[448] 1 SELECT ESSAYS, 837, 843, 844.

[449] See the definitions of seisin given by Sweet, 12 L. QUART. REV. 239.

[450] 34 HARV. L. REV. 621.

[451] Pt. II, Chap. II, §§ 1, 27.

[452] Lawrence *v.* Pitt, 46 N. C. (1 Jones, L.), 344 (1854).

[453] C. 38, § 1. See Early *v.* Early, 134 N. C. 258, 46 S. E. 503 (1904).

[454] Barnitz's Lessee *v.* Casey, 7 Cranch (U. S.), 456 (1812); Buck *v.* Lantz, 49 Md. 439 (1879); Chirac *v.* Reinecker, 2 Pet. (U. S.) 613 (1829); Conner *v.* Waring, 52 Md. 724 (1879).

[455] Garrison *v.* Hill, 79 Md. 75, 28 Atl. 1062 (1894); Jenkins *v.* Bonsal, 116 Md. 629, 82 Atl. 229 (1911).

rule are to be found in determining who shall succeed to a possibility of reverter [456] or have the right to enforce a right of entry for condition broken.[457] In four states — Iowa,[458] Maine,[459] Mississippi,[460] and New Jersey[461] — the statutes of descent are similar to that of Maryland [462] and provide for the disposition of the estate of which the intestate "died seized," but at an early date[463] Mr. Justice Story interpreted similar words in a Massachusetts statute to mean "owning," or otherwise the land of which one had been disseised would not pass. The New Jersey courts adopted this view in interpreting their own statute,[464] and it would seem likely that the courts of Iowa, Maine, and Mississippi would do the same. Instead of tracing descent from the one last seised the almost universal rule in the United States has been to trace descent from the one last entitled.[465]

The only departure from the rule tracing descent from title which threatens to attain the dignity of a general exception is that already mentioned as to possibilities of reverter and rights of entry for condition broken,[466] although in one case the descent of an execu-

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[456] Adams *v.* Chaplin, 1 Hill Eq. (S. C.) 265 (1833); Deas *v.* Horry, 2 Hill Eq. (S. C.) 244 (1835); Seabrook *v.* Seabrook, McMullan Eq. (S. C.) 201, 206 (1841); Church *v.* Young, 130 N. C. 8, 40 S. E. 691 (1902); Puffer *v.* Clark, 202 Mich. 169, 168 N. W. 471 (1918); *contra*, North *v.* Graham, 235 Ill. 178, 85 N. E. 267 (1908). See note to North *v.* Graham, *supra*, 18 L. R. A. (N. S.) 624.

[457] Upington *v.* Corrigan, 151 N. Y. 143, 45 N. E. 359 (1896).

[458] CD. (1897), § 3378; COMP. CD. (1919), § 7903.

[459] REV. STAT. 1916, c. 80, § 1, subs. 1. But see c. 94, § 4.

[460] HEMINGWAY'S ANN. MISS. CD. (1917), § 1381.

[461] COMP. STAT. (1910), 1917.

[462] ANN. CD. (1911), Art. 46, § 1.

[463] Cook *v.* Hammond, 4 Mason (U. S.), 467 (1827), Fed. Cas. 3159. See also Miller *v.* Miller, 10 Metc. (Mass.) 393 (1845).

[464] Moore *v.* Rake, 26 N. J. L. (2 Dutcher) 574, 582, 591 (1857).

[465] Some of the more important decisions not already cited are: Hillhouse *v.* Chester, 3 Day (Conn.) 166, 210 (1808); Bush *v.* Bradley, 4 Day, 298, 305 (1810); Kean's Lessee *v.* Hoffecker, 2 Har. (Del.) 103 (1836); Thompson *v.* Sandford, 13 Ga. 238 (1853); Oliver *v.* Powell, 114 Ga. 592, 600, 40 S. E. 826 (1901); Parker *v.* Nims, 2 N. H. 460 (1822); Prescott *v.* Carr, 29 N. H. 453 (1854); Lakey *v.* Scott, 15 N. Y. WEEKLY DIGEST, 148 (1882); Cote's Appeal, 79 Pa. 235 (1875); Gardner *v.* Collins, 2 Pet. (U. S.) 58 (1829); Hicks *v.* Pegues, 4 Rich. Eq. (S. C.) 413 (1852); Guion *v.* Burton, Meigs (Tenn.) 565 (1838); Guion *v.* Anderson, 8 Humph. (Tenn.) 298 (1847); Medley *v.* Medley, 81 Va. 265 (1886); and see KALES, CASES ON FUTURE INTERESTS, 184 n.

[466] *Supra.*

tory devise[467] and in another the descent of a contingent remainder was traced from the last purchaser.[468]

(2) The rule that a man had to be seised of land at the time of his death in order to devise it found formal recognition in a number of the early statutes, and in Rhode Island this was not changed until 1896;[469] but in only two states, Massachusetts[470] and Virginia,[471] do wills seem to have been declared void because of the rule, and in Massachusetts the rule was changed by statute in 1836,[472] and in Virginia, in 1785.[473] In New York the rule was recognized as applicable to a technical disseisin, but not to an adverse possession,[474] and was discarded altogether in the Revised Statutes of 1828.[475] The principle there laid down,[476] that every interest in real property descendible to heirs may be devised, has been generally accepted in the United States,[477] so that in devise and descent alike seisin has been definitely displaced by title.

(3) Twenty-six states still make seisin a statutory prerequisite of either dower or curtesy or both. Of these, only four — Arkansas,[478]

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[467] Payne *v.* Rosser, 53 Ga. 663 (1875).

[468] Golladay *v.* Knock, 235 Ill. 412, 85 N. E. 649 (1908). It is by no means clear, that the court meant to depart from the rule laid down in North *v.* Graham, *supra*, tracing descent from the person last entitled (see note by Professor Kales, 3 ILL. L. REV. 373, 378), but the case is taken by Professor Freund to revive the common law, regarding the descent of remainders and he argues that the older rule is preferable (33 HARV. L. REV. 526). His argument would seem to indicate a general preference for the present English rule tracing descent from the first purchaser rather than from the one last entitled. It seems extremely doubtful to the writer that the Illinois courts will hold that Golladay *v.* Knock has in any way affected the generality of the rule laid down in North *v.* Graham which is reported in the same volume.

[469] PUBLIC LAWS, c. 203, § 4.

[470] Poor *v.* Robinson, 10 Mass. 131 (1813). In Smithwick *v.* Jordan, 15 Mass. 112 (1818), the rule was recognized but the facts did not call for its application. See also Lincoln *v.* Parsons, 5 Dane Abr. 565 (1795).

[471] Davis *v.* Martin, 3 Munf. (Va.) 285 (1812).

[472] REV. STAT. 1836, c. 62, § 2.

[473] Act of 1785, c. 61. See Hyer *v.* Shobe, 2 Munf. (Va.) 200 (1811); Watts *v.* Cole, 2 Leigh (Va.) 653, 664 (1830); Taylor's Devisees *v.* Rightmire, 8 Leigh (Va.), 468 (1836).

[474] Varick *v.* Jackson, 2 Wend. (N. Y.) 166 (1828). See also Jackson *v.* Rogers, 1 John. Cas. (N. Y.) 33 (1799), and McMahon *v.* Allen, 12 Abb. Pr. 275, 280 (1861).

[475] Part II, chap. VI. Tit. 1, Art. 1, § 2.]

[476] *Id.*

[477] 1 JARMAN, WILLS, 6 ed. Bigelow, 48; 2 REEVES, REAL PROPERTY, 1546; 1 UNDERHILL, WILLS, 57; 4 KENT COMM. 513.

[478] KIRBY AND CASTLE'S DIG., § 2901 (1916).

Missouri,[479] Montana,[480] and Oregon[481]—are west of the Mississippi River, while there are only four states east of that river—Connecticut,[482] Indiana;[483] Maryland,[484] and Ohio[485]—which are not included in the number that do. Notwithstanding these statutes there seems to be no case in the United States where a widow has been denied dower in lands belonging to her husband because they were in the adverse possession of another during coverture.[486] And the requirement of seisin has not generally been held to preclude the widow from dower in an equitable fee.[487] On the other hand, the common-law rule has been invoked to deny the widow dower in reversions and remainders held by the husband during coverture where the prior freehold did not determine until after his death.[488]

(4) Seisin in deed was required at common law for curtesy, whereas only seisin in law was necessary for dower.[489] Notwithstanding this there has been a tendency to allow the husband curtesy in land held adversely during coverture[490] on the ground that immediate right to seisin, notwithstanding an adverse possession, gives seisin in law.[491] This carries fictitious seisin farther than Maitland said it had ever been carried in the English courts,[492] and if generally

[479] REV. STAT., § 345 (1909).

[480] REV. CD. § 3308 (1907).

[481] LORD'S OREGON L., §§ 7286, 7315 (1910).

[482] GEN. STAT. (Rev. of 1918), § 5055.

[483] BURNS ANN. IND. STAT. (Rev. of 1914), §§ 3014, 3016.

[484] ANN CD. (1911), Art. 35, §§ 6, 7.

[485] BATES, ANN. ST. (1899), § 4188.

[486] Apparently the only judicial utterance in the United States supporting the contention that an adverse holding during coverture will preclude the owner's widow from dower is to be found in Thompson *v.* Thompson, 46 N. C. (1 Jones L.) 430 (1854). This was by way of illustration. Dower was allowed in land agreed to be conveyed to the husband. In Ellis *v.* Kyger, 90 Mo. 600, 3 S. W. 23 (1886), a right to enter for condition broken was involved, quite a different thing. As only seisin in law was required for dower, while seisin in deed was required for curtesy, wherever the latter would be allowed notwithstanding a hostile holding, *a fortiori*, the former would be. See 1 TIFFANY, REAL PROPERTY, 2 ed., 738, and *infra*, n. 489.

[487] 1 REEVES, REAL PROPERTY, 669; TIFFANY, REAL PROPERTY, 2 ed., 748.

[488] 1 TIFFANY, REAL PROPERTY, 2 ed., 755; REEVES, REAL PROPERTY, 682.

[489] However, the distinction between seisin in law and seisin in deed has had little place in the law in the United States. 1 SCRIBNER, DOWER, 2 ed., 254. Perhaps the best example of this is in the law of curtesy. See 1 TIFFANY, REAL PROPERTY, 2 ed., 828.

[490] The authorities pro and con are cited in TIFFANY, REAL PROPERTY, 2 ed., 829, nn. 83, 84.

[491] See Borland's Lessee *v.* Marshall, 2 Ohio St. 308 (1853).

[492] 3 SELECT ESSAYS, 591, 597.

accepted, would go far towards making seisin a mere incident of ownership.

(5) The transferability of land in the hostile occupation of another has not been generally associated in the United States with seisin and disseisin, but rather with adverse possession. There has been much in the books on the alienability of land in the adverse possession of another, but relatively little as to the alienability of a right of entry arising from a disseisin. In one form or the other, however, the matter has been the subject of either legislative or judicial pronouncements in all but two states.[493]

In twenty-six [494] out of the remaining forty-six states such lands have been alienable from the first,[495] and among these twenty-six are included six of the original thirteen colonies. In Georgia,[496] Michigan,[497] and Wisconsin,[498] judicial determinations of the non-transferability of such lands were promptly met by legislative action to the contrary. Of the remaining seventeen states, the

[493] Arizona and Washington. There is little likelihood of the adoption of the rule of non-alienability in these two states. That such rule was ever in force west of the Mississippi River was due to the adoption into the Dakota Codes, of Civil Code, § 681, Penal Code, § 189, based on the New York law. Penal Code, § 189, became § 7002, Penal Code of North Dakota, 1895, and § 2260, REV. LAWS, Oklahoma, 1910.

[494] Arkansas, California, Colorado, Delaware, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Utah, West Virginia, Wyoming.

[495] In no one of these states, it is believed, has the rule of non-alienability ever received judicial or legislative sanction. On the other hand, there have been either judicial utterances declaring that such rule was never adopted or statutes of such an early date allowing alienation as to have made that the rule from the beginning. The authorities for the various states are collected in an able note to Huston *v.* Scott, 35 L. R. A. (N. S.) 729, 758. For New Mexico see Gurule *v.* Duran, 20 N. M. 348, 353 (1915).

[496] In Cain *v.* Monroe, 23 Ga. 82 (1857), the court ruled in favor of alienability but on a change in the majority of the court, Cain *v.* Monroe was expressly overruled in Gresham *v.* Webb, 29 Ga. 320 (1859). The legislature immediately restored the rule of alienability, Acts of 1859, p. 24, but in the Code, adopted the following year, there was a provision, § 2524, making void sales by an administrator of lands held adversely, and this has not since been repealed.

[497] In Bruckner's Lessee *v.* Lawrence, 1 Doug. (Mich.) 19, 38 (1843), the court ruled against alienability, but this struck the profession so unfavorably that the law was changed by REV. STAT. 1848, p. 263, § 7. See Crane *v.* Reeder, 21 Mich. 24, 82 (1870).

[498] In Whitney *v.* Powell, 2 Pinney (Wis.) 115 (1849), the court ruled against alienability. The law was immediately changed. REV. STAT. 1849, c. 59, § 7. The rule of non-alienability was restored by REV. STAT. 1858, c. 86, § 7, but in 1865 the legislature readopted the rule of 1849.

alienability of such lands was established by statute in Alabama in 1907,[499] Indiana in 1881,[500] Maine in 1841,[501] Massachusetts in 1891,[502] Mississippi in 1857,[503] Rhode Island in 1896,[504] South Dakota in 1899,[505] Vermont in 1884,[506] and Virginia in 1849.[507] In North Carolina, the act of 1875 seems to assume the continued invalidity of the transfer but allows the grantee to sue in his own name.[508] This leaves only seven states—Connecticut, Florida, Kentucky, New York, North Dakota, Oklahoma, and Tennessee—where the rule of non-transferability is still in force. In two of these states, North Dakota and Oklahoma, the sections of the property law making such lands non-transferable were repealed,[509] but the corresponding sections of the penal law were apparently overlooked [510] and the courts held that the law had not been changed.[511] In Tennessee such lands were at one time transferable [512] and there was judicial authority to the same effect in Kentucky,[513] but statutes modeled after 32 Hen. VIII, c. 9, were enacted in Tennessee in 1821 [514] and in Kentucky in 1824,[515] and they have remained in force since.[516] Only in Connecticut,[517] Florida,[518] and New York,[519]

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[499] CD. 1907, § 3839; Gilchrist *v.* Atchison, 168 Ala. 215, 52 So. 955 (1910).

[500] REV. STAT. 1881, § 1073; Peck *v.* Sims, 120 Ind. 345, 22 N. E. 313 (1889).

[501] REV. STAT. 1841, c. 91, § 1; c. 145, § 6.

[502] GEN. LAWS 1891, c. 354.

[503] REV. CD. 1857, p. 306; Cassedy *v.* Jackson, 45 Miss. 397 (1871).

[504] GEN. LAWS 1896, c. 201, § 23.

[505] LAWS OF 1899, c. 109, § 1. [506] LAWS OF 1884, No. 146.

[507] CD. 1849, ch. 116, § 5; Middleton *v.* Arnolds, 13 Gratt. (Va.) 489 (1856).

[508] LAWS OF 1874–1875, c. 256. See Johnson *v.* Prairie, 94 N. C. 773 (1886).

[509] Section 681 of the DAKOTA CIVIL CODE (see *supra*, n. 493), was dropped from c. 38, Civil Code, North Dakota, and although adopted as § 6137 of the Statutes of Oklahoma of 1893, was dropped in 1897, LAWS 1897, p. 102.

[510] See *supra*, n. 493.

[511] Galbraith *v.* Payne, 12 N. D. 164, 174; 96 N. W. 258 (1903); Huston *v.* Scott, 20 Okla. 142, 94 Pac. 512 (1908).

[512] A statute of 1805 made such lands transferable. See Whitesides *v.* Martin, 7 Yerg. (Tenn.) 384, 395 (1835).

[513] Young *v.* Pate, 3 Dana (Ky.), 306, 309 (1835); but see the authorities collected in the note to Huston *v.* Scott, 35 L. R. A. 760.

[514] L. (1821), ch. 66, § 1. [515] Session Acts, p. 443.

[516] KY. STAT., CARROLL, §§ 210–216 (1915); TENN. CODE, SHANNON, §§ 3172–3175 (1917).

[517] GEN. STAT. 1918, § 5098.

[518] Doe *ex. dem.* Magruder *v.* Roe, 13 Fla. 602 (1870); Nelson *v.* Brush, 22 Fla. 374 (1886); Reyes *v.* Middleton, 36 Fla. 99 (1895).

[519] R. P. Law, § 260. See also Penal Law, §§ 2032, 2033, and C. C. P., § 1501.

therefore, can the rule as to non-transferability be said to be a rule of property apart from the law of champerty and maintenance.

Even where the rule of the non-transferability of land in the adverse possession of another has been a rule of property the accustomed explanation of it has been the avoidance of maintenance and champerty,[520] and in a recent and able note it has been denominated the champerty rule.[521] As such it has been singularly ineffective. That its tendency is to increase rather than to decrease litigation would appear from the long line of cases involving the rule in the Decennial Digest from Oklahoma alone.[522] Nor does it seem to keep down the proscribed transfers. This may be due in part to the absence of the severe penalties of Stat. 32 Hen. VIII, c. 9.[523] It is also due to the fact that from an early time[524] it has been the almost universal[525] rule in the United States that although the grant be void as to the adverse possessor, it is good as between the parties.[526] This enables the grantee to recover in the grantor's name and makes of the rule little more than a trap in the proving of title. In the states where it still survives it is to be hoped that the so-called champerty rule may soon pass into oblivion.

To sum up, if seisin were made a stock of descent in Maryland, dower and curtesy allowed in reversions and remainders in the considerable number of states where they are not so allowed at the present time, and land in the adverse possession of another made transferable in Connecticut, Florida, Kentucky, New York, North Dakota, Oklahoma, and Tennessee, seisin, as an element in the transfer and devolution of land, would be practically obsolete in the United States. This has come about in part through legislative action, but most of this legislative action was at such an early period that it may fairly be said that seisin, as an essential for the

[520] The earliest reported cases in the United States give the avoidance of maintenance as the reason of the rule. Whitaker *v.* Cone, 2 John. Cases (N. Y.) 58 (1800); Jackson *v.* Brinckerhoff, 3 John. Cases (N. Y.) 101 (1802), Kent, J.; Tabb *v.* Baird, 3 Call, 475 (1803); Den *dem.* Gibson *v.* Shearer, 5 N. C. (1 Murphey) 114 (1806).

[521] 35 L. R. A. (N. S.) 729, 731.

[522] 4 SECOND DEC. DIG. 1857.

[523] For some of the penal provisions of the earlier statutes see note to Whitaker *v.* Cone, 2 John. Cases (N. Y.), 58 (1800).

[524] Williams *v.* Jackson, 5 Johns. (N. Y.) 489 (1809); Jackson *v.* Demont, 9 Johns. (N. Y.) 55 (1812), Kent, C. J.; Brinley *v.* Whiting, 5 Pick. (Mass.) 347 (1827).

[525] Kentucky is an exception. See 35 L. R. A. (N. S.) 761.

[526] *Id.*, 737.

transmission of rights in land, was never generally adopted as a part of the American law.

In one respect, however, seisin, or rather the consequences of seisin, were adopted as part of our law, and that was in respect to contingent remainders. Except in Pennsylvania,[527] South Carolina,[528] and perhaps New Jersey,[529] contingent remainders seem never to have been subject to destruction by tortious feoffment, fine, or recovery, nor are there many jurisdictions in which their destruction by merger has been recognized,[530] but in the great majority of states they will fail to take effect if the contingency on which they are to vest does not happen until after the natural determination of the particular estate. Only in Alabama, Arizona, Georgia, Kentucky, Massachusetts, Michigan, Minnesota, Montana, New York, North Dakota, South Dakota, Virginia, West Virginia, and Wisconsin, do there appear to be complete contingent remainder acts.[531]

The tendency which Sweet noticed in England to use seisin in the sense of ownership [532] has been much more marked in the United States than in England. It is believed that if it were not for that tendency seisin would be practically unknown to our present legal vocabulary except in New England, where the continued existence of statutory writs phrased after the old real actions tends to preserve the terminology of the old seisin as against that of the more modern possession.[533] The unfortunate doctrine of the 1700's that under the common law, land was held but not owned,[534] has made lawyers grasp at a substitute for owner-

[527] See *supra*, n. 422.

[528] Tortious feoffments were abolished in 1883. See *supra*, n. 421.

[529] Den *v.* Crawford, 3 Halst. L. (N. J.), 90, 107 (1825). Common Recoveries were abolished in 1799. See *supra*, n. 422.

[530] Since the decision in Bond *v.* Moore, 236 Ill. 576, 86 N. E. 116 (1908), the destruction of contingent remainders by merger has flourished in Illinois. See Kales, 28 YALE L. J. 656, 670, n. 48. But outside of Illinois the only cases of destruction by merger in the United States given by Mr. Kales are Craig *v.* Warner, 16 D. of C. 460 (1887), Archer *v.* Jacobs, 125 Iowa, 467, 101 N. W. 195 (1904), and Bennett *v.* Morris, 5 Rawle (Pa.), 8 (1835).

[531] To the list given by Mr. Kales, 28 YALE L. J. 656, 672, n. 53, should be added Arizona and South Dakota, and from the list, it would seem, Indiana should be subtracted.

[532] 12 L. QUART. REV. 239, 247. [533] See *supra*, p. 726.

[534] 2 POLLOCK AND MAITLAND, 2 ed., 4; MAITLAND, CONSTITUTIONAL HISTORY, 142 *et seq.*; Hogg, 25 L. QUART. REV. 178.

ship, and that substitute has been seisin. And so where statutes have used the term 'seised' it has been held to have been used in the sense of 'owning,' so as to make title the real stock of descent notwithstanding the language of the statute,[535] and so curtesy has been given in land held adversely during coverture [536] and dower in an equitable fee.[537] Probably the most common use of seisin at the present time is in connection with the covenant of seisin in a warranty deed, and there its general use is to indicate indefeasible title.[538] This confusion in terminology will continue until it is definitely recognized that land is owned as well as chattels, just as it was recognized to be by Coke and Bracton.[539]

If the old seisin has thus fared badly at the hands of American courts, it has even been worse with disseisin, or the notion of an estate turned to a right. Right of entry has had a certain vogue because of its association with the action of ejectment, but in general the right of entry for condition broken has been much more conspicuous than right of entry because of a disseisin. The latter never really became acclimated. Instead we have had land in the adverse possession of another.[540] From the artificialities of Preston, who would have made an ouster mean a loss of ownership,[541] we had almost entirely escaped until we came to Professor Ames, while even the common-law incidents of disseisin such as tortious feoffment,[542] discontinuance,[543] tolling of an entry by a descent cast,[544]

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[535] See *supra*, p. 731.

[536] See *supra*, p. 733.

[537] *Ibid.*

[538] RAWLE, COVENANTS FOR TITLE, 4 ed., 76.

[539] See Maitland, 3 SELECT ESSAYS, 591, 592.

[540] Perhaps the most conspicuous instance of this has been the marked absence from most of the statute books of any reference to the transferability or non-transferability of rights of entry. On the other hand, references to the transferability of land in the adverse possession of another abound.

[541] See 34 HARV. L. REV. 624.

[542] See *supra*.

[543] A conveyance in fee by a husband of land held in right of his wife seems never to have worked a discontinuance in this country. The Stat. 32 HEN. VIII, c. 28, has been accepted as part of the common law. See 2 KENT, COM., 14 ed., 133, n. (d.) and 1 WASHBURN, REAL PROPERTY, 6 ed., 181, n. 673. Where fee tails have been recognized, it has been possible from a very early time to dock them by a simple deed so that the effect of such a deed is not a discontinuance but a destruction of the estate.

[544] See 2 GREENLEAF'S CRUISE, REAL PROPERTY, 129, n. 1; 1 REEVE, REAL PROPERTY, 382, n. 3; 2 *ib.*, 1146; 3 WASHBURN, REAL PROPERTY, 6 ed., 124. In Smith *v.*

continual claim,[545] have been almost unknown to us. The rule that a wrongdoer cannot qualify his own wrong has been accepted not as a rule of disseisin but as a rule of disseisin at election.[546] If it had not been said, in an early English case,[547] that the statute of limitations would not run unless there had been a disseisin, the interest for us of the latter would be almost, if not quite, antiquarian. Disseisin is frequently referred to in connection with the statute of limitations, but how completely those who would read disseisin into the statute of limitations fail to grasp the real significance of adverse possession will be taken up elsewhere.

That any one could have seen disseisin in the law of chattels in the United States is due to the unfortunate classification of chattels into choses in action and choses in possession which Blackstone did so much to popularize.[548] Blackstone himself could not have consistently defined a chattel in the hostile possession of another as a chose in action, for he described choses in action as arising out of contracts;[549] but one American judge [550] whom Ames quotes [551] went so far as to describe the right of the owner in such a case as a mere right of action. If such a chattel were a chose in action, then of course it would have come within the rule that choses in action were not assignable, and if belonging to a woman, would not have passed to her husband on marriage. To-day the chattels of a woman do not pass to her husband on marriage, whether in possession or action,[552] and the right to bring an action for the taking of a chattel is generally assignable,[553] so that the occasion for using Blackstone's classification is likely to be slight. It is to be hoped that the day is not distant when the classification of personal property into corporeal and incorporeal will have definitely taken its

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Burtis, 6 John. (N. Y.) 197 (1810), Aigler's Cases, 7, the court denied that entry had been tolled by descent cast, though it would seem to have been a clear case for the application of the doctrine on common-law principles.

[545] *Id.*

[546] Ricard *v.* Williams, 7 Wheat. (U. S.) 59 (1822); Bond *v.* O'Gara, 177 Mass. 139, 58 N. E. 275 (1900). It was otherwise with Coke. See Co. LIT. 271a, and Major *v.* Johnson, 3 Lev. 35 (1376).

[547] Reading *v.* Rawsterne, 2 Ld. Raym. 829. [548] See *supra*, p. 722.

[549] 2 COMM. 396; Elphinstone, 9 L. QUART. REV. 311, 312; T. Cyprian Williams, 10 L. QUART. REV. 143, 146.

[550] Caton, J., in McGoon *v.* Ankeny, 11 Ill. 558 (1850). [551] 3 SELECT ESSAYS, 556.

[552] STIMSON, AMERICAN STATUTE LAW, § 6420B.

[553] See 1 GRAY, CASES ON PROPERTY, 2 ed., 147 n.

place.[554] However this may be, the ease with which American law has taken to the notion that even rights of action in tort are assignable shows how utterly foreign to it was Ames' fundamental thesis that a thing could be transferred but that a right could not.

Conclusion

One of the great desideratums of the law at the present time is the obliteration of the artificial differences between the law of realty and that of personalty. Maitland hoped to help in this by showing that the gulf between the two is not so deep as is sometimes supposed in that seisin was once common to both. Ames also hoped to help in this, but by showing the old law of disseisin still in existence and applicable to chattels. Had his views met with acceptance, he would have wiped out some of the differences in the law applicable to land and chattels but would have added greatly to its artificiality, for he took the old law of disseisin in its most repellant form[555] and applied it regardless of consequences. In doing this he was more than reactionary. He was doing more than attempting to call ghosts back to life; he was attempting to give reality to the "very tedious fairyland"[556] which Preston's brain had invented. In doing so he was running counter to the modern tendency, which has been greatly to extend the transferability of rights and to substitute notions of property and possession from the law of chattels for the discarded notions of seisin and disseisin.[557] It is in the complete realization of this tendency that the hopes of a uniform and inartificial law would seem to lie. The first step in any real advance in the law of real property would seem to be the elimination by legislation of the last vestiges of the 'sophistications' of the old seisin and disseisin.

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[554] This classification is used by Gray, *ib.*, 145 n. It is advocated by Schouler, Personal Property, 5 ed., § 15.

[555] See *supra*, p. 624.

[556] This phrase is used by Gray of Preston's work in general. (Rule Against Perpetuities, 3 ed., p. 582). It is a peculiarly apt description of Preston's treatment of disseisin.

[557] Perhaps the most striking instance of this tendency is the bill now before Parliament to make all estates in land leases for years. See Hudson, "Current Land Law Reform in England," 34 Harv. L. Rev. 341.